

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 463 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

-----  
YUNUSBEG AHMEDBEG MIRZA

Versus

STATE OF GUJARAT

-----  
Appearance:

MR MJ BUDDHBHATTI for Petitioners

MR KC SHAH, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

-----  
CORAM : MR.JUSTICE S.D.DAVE

Date of decision: 26/04/96

ORAL JUDGEMENT

The learned Sessions Judge, Vadodara, under his orders dated January 3, 1996, which appeared to be on the administrative side, under Section 408 of the Code of Criminal Procedure, 1973, was pleased to transfer Sessions Case No.107 of 1995 and Sessions Case No.134 of 1995 pending on the file of the learned Extra Assistant Judge and Additional Sessions Judge, Shri D.K. Rathod to

the file of learned Second Extra Assistant Judge and Additional Sessions Judge, Shri A.K.Aswani, Vadodara. The said orders are in challenge before me, in the present proceedings.

The question which arises for my consideration and decision of the present proceedings is as to whether this could have been done on the administrative side, under the provisions contained in Section 408 of the Code of Criminal Procedure, 1973. The second and the subsequent question which arises is as to whether these orders could be construed as the orders under Section 409(2) of the Code. Upon a careful consideration of the questions and the relevant aspects related thereto, it appears that, the answers to both these questions should be in the negative.

The remarks submitted by the learned Sessions Judge, Vadodara would go to show that, the learned Additional Sessions Judge, Shri D.K.Rathod had requested him, namely, the learned Sessions Judge that, as the former was expecting certain orders of transfer and as the Sessions Cases appeared to be contested, they should be withdrawn from his file. This has been done by the learned Sessions Judge on the administrative side. Despite this, it has been said that these orders are being passed under Section 408 of the Code.

When a reference is made to the provisions contained under Section 408 of the Code, it is clear that, a learned Sessions Judge can transfer a criminal case from one criminal court to another criminal Court in the sessions division. The provisions are eloquently clear. They relate to the proceedings pending before the criminal court in his sessions division. The provisions do not speak of a criminal case pending before the Assistant Sessions Judge or the Additional Sessions Judge. This conclusion is strengthened by the existence of the provisions contained in Section 409 of the Code. Subsection (1) of Section 409 of the Code relates to the transfer of any case or appeal or the recalling of any case or any appeal which the Sessions Judge has made over to any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him to the Court of the Assistant Sessions Judge. Subsection (2) of Section 409 of the Code relates to the transfer of a case or an appeal pending on the file of the Additional Sessions Judge to the Court of any other Additional Sessions Judge in the Sessions Division. Section 409(2) runs thus:

"409(2) At any time before the trial of the case

or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge."

A bare perusal would go to show that so far as the Courts of the Additional Sessions Judges are concerned, recalling of the case or the appeal would be done before the trial of the case or the hearing of the appeal commences. The affirmative trend found to be present in Subsection (2) of Section 409 in a negative form would command that the Sessions Judge cannot recall any case or appeal pending on the file of the Additional Sessions Judge so that, he can make it over to any other Additional Sessions Judge. This is clear, upon a plain reading of the provisions contained under Section 409 of the Code. Probably, no case law would be necessary to convince a judicial mind in this respect. Any how, there has been a clear pronouncement in this respect by the Supreme Court, in STATE OF KARNATAKA, APPELLANT vs. KUPPUSWAMY GOWNDER, RESPONDENT, AIR 1987 S.C. P.1354. Upon a perusal of the provisions contained under Section 409(2) of the Code, it has been made clear that the recalling of the case or an appeal could be done at any time before the trial of the case or the hearing of the appeal commences.

Therefore, if the learned Sessions Judge wanted to recall the said two Sessions Cases pending on the file of the learned Additional Sessions Judge with a view to see that they are made over to some other learned Additional Sessions Judge, the pre-requisite condition was that the trial should not have commenced. It is not in dispute before me that the trial, in fact, has commenced. This is especially so because the charge has been framed. The plea of the accused persons have been recorded and there has been the issuance of the summons to the prosecution witnesses also. This all would go to show eloquently and without any manner of doubt that, when the said orders came to be passed, the trial in respect of both the Sessions Cases had commenced. It is, therefore, clear that under Section 409(2) of the Code also, this exercise could not have been done.

The present proceedings, therefore, require to be allowed. They are hereby accordingly allowed and the orders under challenge are hereby quashed and set aside. The learned Sessions Judge, Vadodara is requested to call both the Sessions Cases on his file and to decide the same according to law on merits. Rule is made absolute accordingly. The registry is requested to see that the

writ of the present orders goes to the learned Sessions  
Judge, Vadodara, forthwith.

\*\*\*\*